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In the Supreme Court of the United States

PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC.,
PETITIONER,

V.

UNITED STATES, ET AL.,
RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of all sizes and in all industries.[1] The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as *amicus curiae* before this Court and the federal courts of appeals, including in cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO") and First Amendment protections for corporate speech. And when misguided decisions of lower courts threaten the interests of the business community and the greater public, the Chamber has supported petitions for this Court's review. This is such a case.

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy the wrongdoing prohibited by the statute. At the same time, the Chamber is concerned that, in this case and broadly throughout the lower courts, the statute is regularly being misused against legitimate

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. Letters of consent from the appropriate counsel who have not previously filed blanket letters of consent have been submitted to the Clerk concurrently with this filing.

businesses. Here, having failed to persuade the courts that the Food and Drug Administration ("FDA") already had the authority to regulate the marketing of tobacco products, and then failed to persuade Congress to provide the FDA that authority, the Clinton administration set out in 1999 to persuade a solitary district court judge to impose the same regulatory scheme by judicial fiat through a nationwide RICO injunction. That gambit should have failed. But at the government's behest, the courts below combined a breathtakingly expansive view of the reach of RICO and a uniquely crabbed view of the First Amendment to justify restrictions on core speech that Congress never intended.

The court of appeals' holding that an entire industry can be labeled a RICO "enterprise" based on corporate competitors' informal coordination on public relations matters exemplifies the lower courts' massive expansion of potential RICO exposure for lawful businesses—converting a statute designed to deter mobsters from victimizing legitimate businesses into a tool for plaintiffs and their lawyers to do the same. This case presents the Court with an appropriate vehicle to stop—and roll back—this unjustified expansion of the RICO statute.

RICO defines an enterprise to include "any individual, partnership, corporation, association, or other legal entity, and *any group of individuals associated in fact although not a legal entity.*" 18 U.S.C. § 1961(4) (emphasis added). As the United States has expressly conceded, and the court of appeals impliedly accepted, a corporation is not an "individual" under § 1961(4). The plain text of the statutory definition thus excludes corporations as constituents of

association-in-fact RICO enterprises, and that reading is confirmed by the well-established purpose of the statute.

The courts of appeals nonetheless have uniformly reached the contrary—and profoundly wrong—conclusion on this threshold question of statutory construction. Several members of this Court acknowledged as much when this issue was presented at oral argument in 2007 in *Mohawk Industries, Inc. v. Williams*, No. 05-465. Yet, the courts of appeals will not reconsider this fundamental issue absent this Court's intervention, and some courts are now interpreting this Court's *dicta* in *Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009), as tacit approval of their position. The Court should seize this opportunity to correct their error.

This case also presents First Amendment issues of great importance to the business community. By imposing RICO liability on corporations for speech made to influence public opinion and affect government policies, this decision threatens to hamstring the ability of American companies to participate freely in public debates on matters critical to their businesses, their employees, and the U.S. economy. And that danger to free expression was exacerbated by the court of appeals' refusal independently to review the record supporting the district court's finding that the speech was knowingly false, and therefore subject to censure. As this Court has repeatedly recognized, the right to free expression is too precious to leave findings of constitutional fact that delineate the boundaries between protected and unprotected speech to the discretion of a single trial judge.

The D.C. Circuit's decision to shelve the presumption against extraterritoriality and apply RICO to the overseas conduct of a foreign company (British American Tobacco (Investments) Limited ("BATCo")) that had no direct or substantial domestic effects is also of great concern to the Chamber and its members. If not corrected by this Court, that holding threatens to bring virtually all foreign business torts within the potential ambit of U.S. law, and the court of appeals' striking disregard for international comity will invite harmful retaliation by other nations against American companies.

Because the D.C. Circuit's decision has far-reaching and disastrous implications for countless businesses, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.[2]

ARGUMENT

I. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A CORPORATION CAN BE A CONSTITUENT OF A RICO ASSOCIATION-IN-FACT ENTERPRISE

The D.C. Circuit's holding that a RICO "enterprise" may comprise corporations associated in

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[2] Although this brief focuses on certain issues critical to the Chamber and its members, the Chamber also supports the other grounds for review advanced by the industry petitioners—Philip Morris USA Inc. fka Philip Morris, Inc., R.J. Reynolds Tobacco Company, et al., Altria Group, Inc., British American Tobacco (Investments) Limited, and Lorillard Tobacco Co.—in their petitions for certiorari.

fact, though consistent with the views of other courts of appeals, conflicts flatly with the plain text and clear purpose of the statute. The lower courts' common error on this threshold issue frustrates the operations of legitimate businesses by exposing them to the threat of industry-wide injunctions, treble damages and unwarranted reputational injury for what amount to allegations of ordinary business torts. This Court should grant review to stop the prosecution of legitimate businesses under the pervasive misinterpretation of a statute enacted to combat gangsters and organized crime.

1. The district court ruled that the industry petitioners violated RICO by participating in the affairs of a joint "enterprise" through acts of wire and mail fraud. Pet. App. 1921a. The court of appeals affirmed. Relying on its prior decision in *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 821 (1988), it held that, because RICO "'defines "enterprise" as *including* the various entities specified,'" the statutory list of qualifying entities "'is not meant to be exhaustive,'" and therefore "a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO 'enterprise,' even though section 1961(4) nowhere expressly mentions this type of association." Pet. App. 18a-19a.

Under that reasoning, whenever corporations work together towards any goal, even informally, they create a RICO enterprise. And whenever a plaintiff can plead an associated pattern of racketeering activity, claims that ordinarily could only have been brought against a constituent corporation as, for example, mail or wire fraud actions, *see* 18 U.S.C. §§ 1341, 1343, are instantly transformed into civil

RICO claims—with the attendant potential for treble damages and attendant stigma, *see* 18 U.S.C. § 1964(c). That outcome "effectively eliminate[s] the enterprise element of RICO and drastically expand[s] federal jurisdiction over all business torts which involve use of the mails or telephones." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1152 (D.N.J. 1983), *aff'd in part, rev'd in part on other grounds*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). The plain text and clear purpose of the statute confirm that Congress never intended to "RICO-ize" such broad swaths of business conduct.

a. RICO's text makes clear that a corporation cannot be a constituent part of an association-in-fact enterprise. Section 1961(4) describes two distinct categories of associations that may qualify as RICO enterprises. *See United States v. Turkette*, 452 U.S. 576, 581-82 (1981). Although the first clause identifies both "individual[s]" and "corporation[s]" as qualifying legal entities, the second clause specifies only a "union or group of individuals" as an associated-in-fact entity. *See* 18 U.S.C. § 1961(4) (emphasis added). As the United States has conceded, a corporation cannot be a constituent part of a "'union or group of individuals.'" *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6, *Mohawk Indus., Inc. v. Williams* (2006) (No. 05-465).

The United States was right to make that concession. As a matter of both common and standard statutory usage "corporations" are not "individuals." *See Webster's Third New International Dictionary of the English Language, Unabridged* 1152 (1971) ("individual" refers to "a single human being as contrasted with a social group or institution"); 1 U.S.C.

§ 1 (listing "corporation" and "individual" as distinct species of "person"); 18 U.S.C. § 1961(3) (defining "person" as "any individual *or* entity capable of holding a legal or beneficial interest in property") (emphasis added). Indeed, this distinction between "individual" and "corporation" is inherent in the definition of a RICO enterprise itself: If the term "individuals" in the definition's second clause encompassed corporations, there would have been no reason separately to identify both "individual" and "corporation" in the first clause. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 21 (2001) (reiterating the "'cardinal principle'" that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (citation omitted).

Although some courts of appeals have nonetheless held that a group of corporations can qualify as a "union or group of individuals associated in fact,"[3] the D.C. Circuit did not rest its decision on that plainly erroneous ground. The court reached the same ultimate conclusion, though, based on its view that, because RICO's definition of "enterprise" is introduced by "includes" rather than "means," its enumeration of different types of enterprises is not exhaustive. Pet. App. 26a. But that rationale is also inconsistent with the plain text of the statute.

To be sure, "includes" can be read to introduce either an illustrative or an exclusive list, depending on the statutory context. *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934). And this Court itself recently observed in *dicta* that Congress's use of "includes"

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[3] *See, e.g., United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995) (citing cases), *cert. denied*, 517 U.S. 1155 (1996).

rather than "means" to introduce § 1961(4) indicates that the enumeration of potential enterprises was not intended to be exhaustive. *Boyle*, 129 S. Ct. at 2243 n.2. If that *dicta* were correct, the D.C. Circuit's conclusion that the industry petitioners constituted an association-in-fact enterprise would still be wrong. As Justice Souter suggested during the oral argument in *Mohawk*, Congress's inclusion only of "union[s] or group[s] of individuals associated in fact" in § 1961(4)'s second clause, after having listed "partnerishipp[s], corporation[s], association[s], or other legal entit[ies]" along with "individual[s]" in the first clause, indicates that viewed only individuals—and not corporations or other legal entities that are not natural persons—as potential constituent members of association-in-fact enterprises. Transcript of Oral Argument at 51, *Mohawk Indus., Inc. v. Williams*, (Apr. 26, 2006) (No. 05-465) [hereinafter "Transcript of Oral Argument"] (observing the "peculiarity of [the "enterprise"] definition in which, although it starts out with the word includes, then follows a ... listing, A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, *i.e.*, individuals, are included") (statement of Souter, J.). Even if groups of corporations could form an association-in-fact "enterprise," moreover, under the "ordinary meaning of the term"—something this Court did *not* address in *Boyle*, *see* 129 S. Ct. at 2243 n.2—labeling the entire tobacco industry an "enterprise" based on competitors' coordination on public relations efforts would be well beyond the pale.

The result in this case should therefore not turn on whether "includes" is used in § 1961(4) to connote exclusivity rather than illustration. But there is good

reason for the Court nonetheless to take the opportunity here to reexamine the *Boyle dicta*, because the answer to that question will matter in many cases and a full examination of the statutory context demonstrates that Congress intended its enumeration to be exclusive. *First*, unlike typical illustrative provisions in which "includes" introduces a single example or an "obviously" incomplete catalog, *e.g.*, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002), in § 1961(4) "includes" precedes a list of five distinct types of legal entity, a catch-all category of "other legal entit[ies]," and lastly a "union or group of individuals associated in fact although not a legal entity." That level of specificity, and the inclusion of a catch-all within the list, indicates that the enumeration is intended to be exhaustive. *See* Transcript of Oral Argument at 42 ("[I]f this is not an exhaustive list, the only thing that seems possibly to be omitted from the list is what's involved here, which is a group consisting of a corporation or other legal [entity] ... and natural persons.") (statement of Alito, J.).

Second, Congress's use of a catch-all category in the first clause of § 1961(4), and omission of a similar catch-all in the second clause, indicates that Congress drafted the second clause as the exhaustive, rather than an illustrative, definition of association-in-fact enterprise. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citation omitted) (alteration in original).

Third, Congress used "includes" to introduce statutory enumerations in three companion subsections of § 1961, *see* 18 U.S.C. §§ 1961(3), (9), (10), and in each of those three subsections "it is unquestionable" that the term introduces an exhaustive list. Transcript of Oral Argument at 48 (statement of Scalia, J.); *see* 18 U.S.C. § 1961(9) ("'documentary material' *includes* any book, paper, document, record, recording, *or other material*") (emphasis added); *id.* § 1961(3) ("'person' *includes* any individual or entity capable of holding a legal or beneficial interest in property") (emphasis added); *id.* § 1961(10) ("'Attorney General' *includes* the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter") (emphasis added). Absent an indication otherwise, it is well established that a word should be given the same meaning throughout a statute. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006).

Fourth, when Congress intended in RICO to introduce a merely illustrative list, it used "including, but not limited to" to make that clear. *See* 18 U.S.C. § 1964(a) (using phrase "including, but not limited to" to introduce an illustrative list of permissible injunctive orders). The absence of the same "but not limited to" phrase in § 1961(4) and the other provisions of § 1961 that use the term "including" to introduce definitional

lists confirms that Congress meant something different in those provisions. *See Russello*, 464 U.S. at 23.

The D.C. Circuit attempted to distinguish the use of "including, but not limited to" in § 1964(a) by suggesting that Congress may have thought it necessary to make express the illustrative nature of the specification in that provision because, unlike § 1961, § 1964(a) lacks the "juxtaposition of the non-exhaustive term 'includes' with the exhaustive term 'means.'" Pet. App. 27a. That rationale is unpersuasive. If "includes" introduced merely illustrative listings in § 1961(4), that connotation surely would carry over to § 1964(a), which is "close enough" to share a common parlance. Transcript of Oral Argument at 43 (statement of Scalia, J.); *see, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("[A] term should be construed, if possible, to give it a consistent meaning throughout the Act.").

In any event, even if an illustrative interpretation were plausible, § 1961(4)'s breadth is "at least ambiguous," Transcript of Oral Argument at 47 (statement of Scalia, J.), and the rule of lenity thus requires the narrowest reasonable construction—that only groups of individuals, not other legal entities such as corporations, may constitute an association-in-fact enterprise. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (rule of lenity applies to statutes with both civil and criminal applications) (citing cases).

b. Reading § 1961(4) that way is also far more consistent with RICO's purposes. The legislative record makes clear that Congress intended through RICO "to seek the eradication of organized crime in the United States" and to counteract organized crime's infiltration and corruption of "legitimate business and

labor unions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923. Nothing in the legislative history suggests that Congress thought existing legal remedies were insufficient to address tortuous conduct by legitimate corporations, much less that Congress meant to provide the Executive freewheeling authority to regulate-by-injunction industries that are already subject to extensive legislative and administrative oversight or to provide plaintiffs and their lawyers a bludgeon to extract settlements from lawful businesses.

As Justice Alito has explained, RICO had "two aims": "to stop organized crime's infiltration of legitimate business" and "to make it unlawful for individuals to function as members of organized criminal groups." Samuel Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (Gary L. McDowell ed., 1989); *see also, e.g.*, Transcript of Oral Argument at 44 (statement of Breyer, J.) (noting that Congress may have "put in the word groups of individuals" because it "was worried about organized crime taking over the pizza parlor or taking over a trades union or taking over a similar kind of enterprise"). A plain language construction of § 1961(4) fully suffices to meet these goals.

By defining a RICO enterprise to include any "legal entity," the first clause ensures that the law reaches efforts of organized crime to infiltrate legitimate businesses or use pretextually legitimate businesses to mask criminal activity. And the second clause's specification of a "union or group of individuals associated in fact although not a legal entity" appropriately recognizes that organized crime often acts through a loose confederation or association of

individuals. But nothing in RICO's text, legislative history, or overriding purpose suggests that Congress was also concerned about confederations of *corporations* banding together. Counting informal corporate joint ventures as enterprises "would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity .... Congress wouldn't have wanted to [do] that [as that had nothing] to do with organized crime ... [or] with taking over legitimate enterprises [by organized crime]." Transcript of Oral Argument at 44-45 (statement of Breyer, J.). Put another way, Congress "had something significantly different in mind." *Id.* at 36 (statement of Roberts, C.J.). RICO is not—and was never understood to be—necessary to prevent businesses from joining together in illegal activities. Such concerns are fully and adequately addressed by other laws, including statutes prohibiting criminal conspiracy, 18 U.S.C. § 371, and mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343.

RICO was intended to *protect* legitimate businesses, not to impose new and onerous burdens on them. Its legislative history portrays corporations as victims, not perpetrators, of organized crime. *See, e.g.*, 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska) (Title IX was "designed to remove the influence of organized crime from legitimate business ... by removing its members from control of legitimate businesses"); S. Rep. No. 91-617, at 1 (1969) ("money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business"). It is ironic that this statute, enacted as a shield to protect legitimate businesses from misuse, is being transformed by the lower courts into a weapon for

imposing arbitrary and onerous costs on such businesses.

2. The D.C. Circuit's misconstruction of RICO's "enterprise" definition, if left intact, will continue the long march of the courts of appeals to transform routine allegations of corporate misconduct into treble damages actions under RICO. If this trend continues, RICO will impose increasingly significant and unintended costs on American businesses. And nothing short of this Court's intervention will reverse this trend, particularly as lower courts are now interpreting this Court's *dicta* in *Boyle* as tacit approval of the status quo. If review is not granted, the government will be further emboldened to pursue regulation-by-injunction without the "hassle" of seeking congressional approval, and plaintiffs and their attorneys will be further emboldened to hound American businesses, even when those businesses are engaged in standard and lawful practices.

The ongoing "RICO-ization" of ordinary business torts imposes enormous costs on the national economy, even aside from its use here as a tool for imposing massive, unauthorized nationwide regulation. A RICO civil action in the hands of plaintiffs' lawyers is an "unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). In addition to potentially ruinous treble damages and the government's thus-far-unsuccessful efforts to secure massive retrospective disgorgement, businesses experience "an almost inevitable stigmatizing effect" when sued under a statute associated with racketeers and mobsters. *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990). Unsurprisingly these attributes

have made RICO a popular litigation tool of the plaintiffs' bar.[4] "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting). Designed to deter and root out organized crime, RICO's expanding scope now facilitates strike suits by plaintiffs and their lawyers to extract settlements from legitimate businesses.

In the Chambers' and its members' experience, the vast majority of civil RICO cases filed against corporations under the lower courts' misguided conception of a RICO "enterprise" have involved ordinary business torts. These suits do nothing to promote Congress's goals, and instead "apply RICO to new purposes that Congress never intended." *See Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). Yet because the courts of appeals have uniformly come out the wrong way on this issue, the abuse of the RICO statute against legitimate businesses will persist until the Court intervenes.

The Court should correct this fundamental error now. Several Members of the Court recognized the importance of this issue in 2007 during the oral

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[4] According to the Administrative Office of the U.S. Courts, 749 civil RICO actions were filed in federal court in the year ending March 31, 2009 alone. *See Federal Judicial Caseload Statistics*, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2008 and 2009), *available at* http://www.uscourts.gov/caseload2009/tables/C02Mar09.pdf) (last visited Mar. 13, 2010).

argument in *Mohawk*, and this case presents the issue squarely. Given the enormous risks involved in defending RICO actions, moreover, most of these cases—including those involving meritless claims—settle. This case therefore presents the Court with a rare vehicle to resolve this vitally important issue.[5] The Chamber urges this Court to grant certiorari and restore the definition of a RICO association-in-fact enterprise to the one that Congress provided: a "group of *individuals* associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4) (emphasis added).

II. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A RICO ACTION MAY CONSTITUTIONALLY BE BASED ON STATEMENTS MADE TO INFLUENCE PUBLIC OPINION AND AFFECT GOVERNMENT POLICY

The D.C. Circuit stretched RICO far beyond its breaking point, and beyond the statute's constitutional scope, when it decided that the defendants could be held liable for statements overwhelmingly made to influence public sentiment and affect legislative and enforcement policy. Pet. App. 43a-46a. Indeed, "98.9% of the 'fraudulent' public statements identified by the district court"—addressing the health effects of smoking and secondhand smoke, the addictive nature of nicotine, and alleged manipulation of nicotine levels—"were not product advertisements, but op-ed

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[5] Notably, resolution of this issue would also resolve the deep circuit split over whether a corporation and its agents can constitute an enterprise distinct from the corporation itself. *See* Brief of Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner at 2-3, 18-19, *Mohawk Indus., Inc. v. Williams* (2007) (No. 06-873).

pieces, congressional testimony, and the like." Reynolds Pet. 16. Yet, the court of appeals held that *Noerr-Pennington* does not apply, and RICO and underlying federal anti-fraud statutes do apply, because the district court found the statements "clearly and deliberately false." Pet. App. 44a-45a. That holding is flatly inconsistent with the decisions of this Court and other courts of appeals, and if not reversed will substantially hinder the business community's ability to participate freely in public debate on matters central to the welfare of those businesses, their employees, and the U.S. economy.

Contrary to the D.C. Circuit's understanding, *Noerr-Pennington* applies foursquare to *all* speech made to influence public opinion towards the enactment or enforcement of law, regardless of whether the speech is true, false, or fraudulent. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, itself involved a third-party publicity campaign by railroads to advance legislation adverse to the trucking industry by use of "'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.'" 365 U.S. 127, 140 (1961) (quoting district court) (alteration in original). This Court nonetheless held that the railroads could not be held liable under the Sherman Act without infringing their constitutional right to petition the government. *Id.* at 137-41; *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) ("A publicity campaign directed at the general public, seeking legislation or executive action, enjoys [statutory] immunity, even when the campaign employs unethical and deceptive methods.").

Other courts of appeals have likewise recognized that speech to influence public opinion and government policy is an essential feature of our political landscape, and that the truth or falsity (or even fraudulent nature) of statements made in that context are fodder for political combat, not suits at law. *See, e.g., Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000) ("Even *false* statements presented to support [petitions to the government] are protected."); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) ("While we do not condone misrepresentations, we trust that the council and agency, acting in the political sphere, can 'accommodate false statements and reveal their falsity.'") (citation omitted), *cert. denied*, 488 U.S. 965 (1988). Until now, the D.C. Circuit never suggested otherwise. Although the court cited its prior decision in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), *see* Pet. App. 44a, *Abell* involved the government's historical ability to punish false statements made in adjudications and expressly distinguished *Noerr-Pennington* speech. *See* 48 F.3d at 1255 ("'Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.'") (citation omitted).

Review of this aspect of the court of appeals' decision is well warranted. Liability under RICO should not lie for views expressed in the course of and to affect public debate and government policy, such as industry petitioners' opinions about the then-uncertain health effects of secondhand smoke or arguments about semantic differences between "addiction" and "dependence." The expansion of RICO from the marketplace into the marketplace of ideas will chill businesses from participating fully in important public

debates, and cede the field to anti-business lobbies. Congress never so intended. As this Court recognized with respect to the Sherman Act, so too with RICO: "The proscriptions of the Act ... are not at all appropriate for application in the political arena." *Noerr*, 365 U.S. at 141.

III. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER INDEPENDENT APPELLATE REVIEW IS REQUIRED OF CONSTITUTIONAL FACTS THAT DISTINGUISH PROTECTED FROM UNPROTECTED SPEECH

The D.C. Circuit's holding that the First Amendment does not protect core political speech if it is "deliberately false [and] misleading," Pet. App. 44a, put dispositive constitutional weight on the district court's factual finding that the defendants' statements were "clearly and deliberately false," Pet. App. 45a (citing *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 146, 208-09, 309, 860, 864 (D.D.C. 2006)). Under *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984), the First Amendment rights at stake demanded independent appellate review of that crucial finding. Yet, even though the court of appeals acknowledged that it "may not have reached all the same conclusions as the district court," it reviewed the district court's findings "under the highly deferential clearly erroneous standard." Pet. App. 67a. That reinforced a persistent circuit conflict over the necessity for independent appellate review of constitutional facts. The issue is squarely presented in this case and it manifestly warrants this Court's attention.

In *Bose*, this Court addressed the appropriate standard of review of the finding of "actual malice" in a product disparagement case. The Court observed that in libel, fighting words, obscenity, and child pornography cases, it had "regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." 466 U.S. at 504-05; *see also id.* at 505-10 (discussing prior cases). The Court explained that independent appellate review was necessary because "[p]roviding triers of fact with a general description of the type of communications whose content is unworthy of protection has not, in and of itself, served sufficiently ... to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 505. It concluded that "[t]he requirement of independent appellate review ... is a rule of federal constitutional law." *Id.* at 510.

Since *Bose*, this Court has consistently adhered to that rule, including in cases involving commercial speech. In each case it has independently reviewed the facts critical to the determination whether the challenged speech is constitutionally protected. *See* Philip Morris Pet. 14-16. The Fifth, Tenth and Eleventh Circuits have followed suit. *See id.* at 16. Despite the clarity and consistency of this Court's direction, however, the D.C. Circuit believes "the implications of *Bose* are far from clear," *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 n.3 (D.C. Cir. 1985), and, along with the Fourth Circuit, it has refused independently to review constitutional facts that separate protected from unprotected commercial

speech. *See* Philip Morris Pet. 17. In this case, the D.C. Circuit, without discussion, extended that approach to noncommercial speech and reviewed the district court's finding that industry petitioners' speech was fraudulent, and thus unworthy of constitutional protection, only for clear error.

In *Bose*, this Court concluded that independent appellate review of constitutional facts is required in the First Amendment context because the "stakes" of free speech are simply "too great to entrust them finally to the judgment of the trier of fact." 466 U.S. at 501 n.17. This case exemplifies the danger of ignoring that teaching. Absent independent appellate review, a single judge's belief that industry petitioners crossed the line of permissible public advocacy will deprive their speech of all constitutional protection and permit sweeping restrictions on their rights to communicate freely on matters of public concern. This Court's intervention is necessary to prevent that from happening in this and future cases.

IV. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER RICO APPLIES TO EXTRATERRITORIAL CONDUCT OF FOREIGN CORPORATIONS THAT HAS NO DIRECT OR SUBSTANTIAL EFFECTS IN THE UNITED STATES

The D.C. Circuit's affirmance of the RICO judgment against BATCo also warrants this Court's review, on several grounds.

First, the D.C. Circuit refused to apply the established presumption against extraterritoriality. In direct conflict with this Court's decisions and those of other courts of appeals, *see* BATCo Pet. 12-13, the D.C. Circuit hewed to its idiosyncratic view that

"Congress's regulation of foreign conduct [with substantial domestic effects] is '*not* an *extraterritorial* assertion of jurisdiction.'" Pet. App. 58a (citation omitted). Thus, in the D.C. Circuit, the normal presumption is reversed: All federal laws apply to foreign conduct unless Congress expressly provides otherwise. Although other federal courts have taken differing views on *how* the presumption against extraterritoriality should be applied—a situation that itself warrants this Court's attention—the D.C. Circuit's view that the presumption effectively does not exist is flatly at odds with all of them, and irreconcilable with this Court's precedent, Congress's understanding, and traditional norms of international comity. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85, 88 (1998).

Second, when the D.C. Circuit considered whether RICO applies to the particular foreign conduct the district court found here, it adopted the effects test from the antitrust and securities contexts without any consideration whether that test captures what Congress actually had in mind in RICO. This Court did not formulate the effects test as a one-size-fits-all framework to determine the extraterritorial limits of all domestic laws, but instead determined that this test best effectuated Congress's specific intent under federal antitrust and securities laws. *See North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996).

Third, in affirming the district court's judgment against BATCo, the D.C. Circuit so diluted the effects test that it will routinely permit prosecution under RICO (and other federal laws) of wholly foreign conduct. Although the court recited that foreign

conduct must have "a substantial, direct, and foreseeable effect within the United States," Pet. App. 59a, it held sufficient foreign conduct with *at most* indirect and slight effects in this country. The district court did not find that BATCo made fraudulent statements to any U.S. consumer. The D.C. Circuit nonetheless affirmed BATCo's RICO liability based on (1) BATCo's provision to its U.S. subsidiary of "sensitive nicotine research" conducted abroad, which the U.S. subsidiary never shared with anyone else; (2) BATCo's "found[ation], fund[ing], and active[] participat[ion] in various *international* organizations, which [other] Defendants ... saw as instrumental to *their* efforts" in the U.S.; and (3) "the tremendous domestic effects of the fraud scheme generally." Pet App. 59a-60a (emphasis added). If those attenuated effects justify the application of RICO to overseas conduct, foreign business torts will regularly be within the ambit of U.S. law—at least so long as suit is brought within the D.C. Circuit.

Beyond their obvious importance to foreign actors and international comity, these issues are also vitally important to American business. If not corrected, the D.C. Circuit's unwarranted expansion of RICO's territorial scope will invite retaliation by other nations, to the detriment of U.S. businesses and the U.S. economy. *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand. L. Rev. 1455, 1490-91 (2008). American companies' foreign operations will also suffer if they are forced to contend with inconsistent and overlapping regulation by U.S. authorities and the controlling law of their host jurisdictions. Certiorari is warranted to prevent that from happening.

CONCLUSION

The industry petitioners' petitions for *certiorari* should be granted, and the judgment should be reversed.

Respectfully submitted,

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